

Analysis: International Crimes in Myanmar Alleged in Human Rights Council Report

September 11, 2018

By: James Hendry

On August 24, the Human Rights Council released the Report of the Independent International Fact-Finding Mission on Myanmar[1] in advance of its 39th session in September. This followed the flight of almost three-quarters of a million Rohingya to Bangladesh by August 2018 to live there in dire conditions in refugee camps.

This article will first look at the conclusions of the Mission and then look at its exacting methodology. Next, it will look at the role and mechanism of hate speech in precipitating ethnic conflict and the way it fits in the pattern of violence that has generated such suffering. It will then examine the Mission's substantive findings for the States in Myanmar that it examined as it builds its case against impunity of those involved in directly and indirectly working violence on the Rohingya and other ethnic groups.

The Report

The Report finds sufficient evidence to warrant investigating senior commanders in the army, the Tatmadaw, for genocide in the Rakhine State.[2] It also found evidence that would warrant investigating the Tatmadaw for crimes against humanity in the Kachin and Shan States (north and east Myanmar) for the crimes of murder, imprisonment, enforced disappearance, torture, rape, sexual slavery and

other forms of sexual violence, persecution, and enslavement. Additionally, in Rakhine State (west Myanmar), the evidence supported investigating these crimes against humanity as well as those of extermination, deportation, and persecution and perhaps the crime of apartheid, based on evidence of discrimination and systematic oppression. The evidence showed the acts were part of a widespread and systematic attack on a civilian population.[3] The Mission also concluded that much of this conduct demonstrated the war crimes of murder, torture, cruel treatment, outrages upon personal dignity, attacking civilians, displacing civilians, pillaging, attacking protected objects, taking hostages, sentencing or execution without due process, as well as rape, sexual slavery, and sexual violence. This was based on its conclusion that a non-international armed conflict had been going on in the Kachin and Shan States from 2011 and the Rakhine State at least from August 25, 2017 between the Tatmadaw and local militias.[4] The Mission also noted that some of these local militias, namely the Arakan Rohingya Salvation Army (ARSA) and various ethnic armed organizations (EAOs) might also have committed war crimes.[5] The Mission names the names of alleged perpetrators of crimes under international law. In Rakhine State these included Tatmadaw commanders, who exercised effective control over direct perpetrators, to be investigated and prosecuted[6] and specified ameliorative actions that should be taken, including:

- perpetrators should be made accountable,
- the UN should assist Myanmar to exercise its primary responsibility to protect its people,
- the Security Council should refer the situation in Myanmar to the International Criminal Court[7], or some hybrid Court, as well as issue sanctions,
- the General Assembly should ensure gathering and protecting evidence in the meantime,
- the Office of the High Commissioner for Human Rights (OHCHR) should take steps to ensure accountability for human rights violations,
- the UN and other international bodies must ensure the repatriation, with full human rights protections, including citizenship, of refugees and the re-location of the internally displaced, engage with Myanmar only if it ensures full human rights protections, and shun dealings with the Tatmadaw until it complies with human rights norms,
- Member States should do what they can to prosecute offenders,
- the UN should set up a Trust Fund for Victims.[8]

The Mission focused on the crisis in Rakhine, hostilities in Kachin and Shan States and the infringement of fundamental freedoms particularly through hate speech. How did it proceed, especially facing lack of co-operation by Myanmar?

Methodology

The Mission commenced its Report by describing its careful methodology. It uses the language of the law to describe the strength of the findings it made, findings that the Mission said were made in accordance with international law as it applied in Myanmar. It makes its findings in accordance with the principles of the crimes it discovered on a “balance of probabilities” (though not the criminal standard of “beyond a reasonable doubt”) and adopted the judicial vocabulary by describing its actions

being in accord with “independence, impartiality and objectivity” and described how carefully it did its work gathering evidence, presumably expecting close scrutiny and for creating a strong basis for an assertion of the Rule of Law.[9] The Mission sought specialized advice on sexual and gender-based violence which it found to be prevalent. The Mission expressed concern about reprisals against witnesses.

The Mission described the general context of constitutionalized military dominance in Myanmar and the Tatmadaw’s use of ethnically-based armed conflict, including the “Rohingya crisis,” to bolster its own continuing power in Myanmar as protector of national unity. The Mission described the Tatmadaw’s increasing use of a defined list of eight ethnic group, broken down into “national races,” as the key criteria for the inclusion of a group in the State. The Tatmadaw has excluded the Rohingya and other groups from that category, indicating that they do not belong in Myanmar, effectively making them the “other” in the State in which they live.[10]

The power of hate speech

The Report’s focus on hate speech demonstrates the power of ideas and their expression to catapult an entire ethnic group into terror and destruction. The Report describes how thoughts and words of hate were used to overcome the natural tendency of people to avoid murdering one another, to reject the previous situation of amity or cooperation between groups. Randall Collins, an American sociologist, theorizes that violent situations are shaped by an emotional field of tension and fear in a situation of confrontation, rather than by a gradual build-up of these emotions, and those who are good at violence are those who find a way to overcome confrontational tension/fear by turning the emotional energy in the situation to their advantage and away from the disadvantaged.[11] One of the key elements according to this Report is the emotional energy harnessed by hate speech by the Tatmadaw against the Rohingya.

Though the Rohingya have suffered for years, deprived of citizenship and referred to in Myanmar as Bengalis,[12] the Mission interviewed Rohingya and Rakhine who said that relationships between the communities were good, both in business and friendships, prior to 2012.[13] It reports that violence between them after 2012 were not “spontaneous outbursts of hostility” but resulted from a plan to instigate violence and amplify tensions.[14] The Mission noted that the Rakhine Nationalities Development Party (RNDP), various Rakhine organizations, radical monks, officials and influential figures undertook a hate campaign aimed at dehumanizing the Rohingya that increased in intensity after June 2012, a campaign that was spread through anti-Rohingya and anti-Muslim publications and at public meetings. Rohingya were labelled illegal immigrants, terrorists and were described as a threat that would “swallow other races” with their “uncontrollable birth rates”. The RNDP referred to Hitler in arguing that “inhuman acts” might be necessary to “maintain a race”.[15] Myanmar security forces were at least complicit or worse.[16] In fact, the Tatmadaw Commander-in-Chief, Senior-General Min Aung Hlaing, said as the persecutions proceeded: “The Bengali problem was a long-standing one which has become an unfinished job despite the efforts of the previous governments to solve it. The government in office is taking great care in solving the problem.”[17]

The Mission reported the suppression of dissent in areas of conflict in Myanmar where authorities incite perpetrators of human rights violations by hate speech. The Mission found a temporal if not a causal connection between hate speech and violence, especially in Rakhine. The Myanmar authorities condoned the use of hate speech as a device to control the Rohingya and other Muslims and to advance nationalistic feeling even though their language is not as incendiary as non-State actors. Myanmar and the Tatmadaw created a positive environment for hate speech, human rights violations and incitement to discrimination and ethnic violence.

We do not have to delve deeply into history for other examples of the incendiary power of hate speech or the mechanism by which it works. A similar use of hate speech played a role in inciting the Rwanda massacres of 1994. The Supreme Court of Canada, in *Mugesera v. Canada (Minister of Citizenship and Immigration)*,[18] upheld the deportation of a politician who had addressed a hard-line Hutu political party shortly before the massacres, referring to Tutsis as “cockroaches” and who spread fear among the Hutu that the Tutsi were going to attack the Hutu population.[19] On the grounds that he had incited Hutus to murder, genocide and hatred, and had committed a crime against humanity, he was therefore inadmissible to Canada under immigration law. The Court wrote: “The risk of hatred caused by hate propaganda is very real.”[20] Most recently, in *Saskatchewan (Human Rights Commission) v. Whatcott* [21] the Supreme Court of Canada held that the prohibition of extreme hate speech by statutory human rights law is justified because hatred results in denigrating the target group, making them more vulnerable to other breaches of their rights all the way to genocide, by ultimately prohibiting their ability to participate in the public life of society by degrading or removing their ability to reply to the treatment they are receiving.[22]

An interesting point is the role of social media. While the Report noted that Facebook is a vehicle for the propagation of hate,[23] the Mission also quoted a victim who watched Facebook to see if his son, forcibly recruited in 2016, is in a post, either dead or alive.[24] Facebook removed accounts and pages and banned certain users, formally saying that it wished to prevent its platform from being used to spread ethnic and religious tensions.[25] The Economist also reports that Facebook has responded to the Report (deleting the quotation from the Commander-in-Chief, set out above, and promising to keep records about him. One of the authors of the Report is reported to have said that “Facebook is more helpful than the UN Security Council at the moment”.[26]

Rakhine

Rakhine is a poor State, with Buddhists constituting the majority in the State and Rohingya Muslims the majority in the north. As already noted, Mission interviews with both Rakhine and Rohingya showed a reasonably peaceful coexistence prior to 2102, contrary to a common belief that there was a history of grievance and prejudice.[27] Rakhine ethnic groups suffered some of the security force human rights violations such as those suffered by other ethnic groups such as the Rohingya. The Tatmadaw used Rakhine men for forced or compulsory labour, evicted them by force, inflicted sexual violence on Rakhine women and repressed expressions of identity.[28] But the Rohingya were singled out for decades of exclusion from legal status in Myanmar, most rendered stateless, excluded through

a system of “national races”.[29] The State imposed travel restrictions affecting their economic life, personal security and education for decades, actions that included restrictions on the number and spacing of children. Civil society and UN bodies had been warning of impending catastrophe for decades.[30]

With this background of decades of exclusion, the Mission identifies two waves of violence in 2102 as triggers for what followed.[31] While the Government was successful in portraying the violence as intercommunal, the Mission’s research showed that it was instigated according to a plan that was already underway to incite hate and to dehumanize the Rohingya, led by the RNDP through hate speech, its main vehicle, in which the Myanmar security forces were complicit. The complicity was direct, torturing, shooting, arbitrarily arresting and injuring Rohingya and destroying their property and indirect, in failing to do intervene in other groups’ predation.[32] The Kaman Muslim group also became targets. After 2012, Rohingya communities were segregated and further marginalized with long-term effects, seeing their civil liberties, such as voting and enrolling in university, further restricted. Ethnic tensions increased. Huge numbers of Rohingya were displaced in the violence and arbitrarily forced to live in intolerable conditions in camps.[33]

On August 25, 2017, ARSA attacked security forces’ outposts in Rakhine apparently in response to what was happening to Rohingya communities, and to get global attention.[34] Within hours, the government responded in what the Mission described as a grossly disproportionately way, leading to targeting and terrorizing the Rohingya community in “clearance operations” and thence to massive flight to Bangladesh.[35] The Mission observed that the Tatmadaw retaliations were strikingly similar, attacking a village early then setting it afire and indiscriminate gunfire, such that the scale and method showed a high level of planning consistent with the statement of the Commander in Chief of the Tatmadaw that they were “taking great care in solving the problem.”[36]

The Mission found that the “clearance operations” created a human rights catastrophe of mass killing and sexual violence on a “massive scale” committed by Tatmadaw soldiers. The pattern was that most Rohingya dwellings were destroyed, followed by systematic appropriation, according to anti-Rohingya resettlement plans.[37] Rape and other forms of sexual violence were systematically carried out to maximize the suffering of the victims and community. The Mission noted that many were women were killed, and the survivors showed signs of deep trauma, damage to their reproductive capacity and “immense stigma in their community”.[38] The Rohingya were terrorized by the Tatmadaw as they departed and oppressive measures against the Rohingya increased. They were pressed to accept National Verification Cards that identified them as Bengali immigrants, further denigrating them and hampering their mobility.[39] Humanitarian aid was restricted or blocked. A Government Investigation Commission cleared the security forces of wrongdoing.[40] The Government commitment to Rohingya repatriation makes no provision for restoration of human rights or repair of basic problems and would be enforced by the Tatmadaw.

The Mission assigns blame to the Tatmadaw for most serious violations of human rights and almost all of the sexual violence. Though other Rakhine groups joined in the clearance operations, it appears to

have been organized by the Tatmadaw.[41] The Mission also noted the human rights abuses committed by ARSA.

Kachin and Shan States

The Mission found that the Tatmadaw also carried on similar patterns of violence against the ethic armed organizations (EAOs) in the Kachin and Shan States since 2011 who were not part of the National Ceasefire Agreement. Consistent opposition to government action about a variety of issues and greater claims for autonomy, against discrimination and Tatmadaw violations of human rights, has fueled these conflicts that have resulted in patterns of violation of international human rights. Systemic and indiscriminate attacks against civilians and civilian objects by the Tatmadaw characterize their operations in these areas, as with the Rohingya.[42] The Tatmadaw also engaged in sexual violence, forced labour, enforced disappearance. The motivation often appeared to be based on ethnic affiliation and a concern that those of military age will join the EAOs.[43] The Mission also noted that the EAOs committed humanitarian law violations, especially in their duties to civilians, though they appeared to be frequent, but not systematic like those of the Tamadaw.[44] Many thousands were internally displaced because of the conflict and other restrictions, and taken to camps where they suffer severe deprivations. Humanitarian aid has frequently been impeded.

Building the criminal case

The Mission then reviewed the operations of the Tatmadaw again with a view to building a criminal case against them. The Tatmadaw failed to respect the principles of international humanitarian law of distinction, proportionality and precaution, leading to deliberate targeting civilians and through their “clearance operations” which were “essentially scorched earth campaigns” destroying civilians and their property. The Mission decided that these amounted to criminal conduct.[45] The scale, brutality and systematic nature of the use of sexual violence showed that the violence was part of a deliberate strategy to terrorize a civilian population and that it was meted out in a context of impunity.[46] The on-going policy of exclusion of the Rohingya was exacerbated by hate speech. The Tatmadaw operated with impunity, promoting more predatory conduct. Occasional Government investigations would conclude that the Tatmadaw acted legally, but only reinforced their impunity, not being under civilian control in any event. The Tatmadaw punished only seven soldiers so far for their involvement in an infamous massacre.[47] The Tatmadaw Command refuses to act responsibly.

The Mission holds that non-state armed groups committed crimes against civilians and that they should also be held accountable. The Tatmadaw was the main perpetrator though. The Mission came to the legal conclusion that both individual perpetrators and in many cases, their commanders were liable where Tatmadaw commanders had effective control, but failed to take necessary and reasonable measures to prevent and punish perpetrators and where there was a causal link between this failure and the atrocities inflicted on the Rohingya and others. Other elements of the security forces such as the police and the border guard were also found to be perpetrators in Rakhine. Other private individuals and groups assisted them. The Mission deposited a list of direct and indirect

perpetrators with the High Commissioner for Human Rights for use in the pursuit of justice.[48]

Though the Mission noted that civilian authorities did not have the constitutional power to control the Tatmadaw, nor was there evidence that they participated, it noted that they did nothing to attempt to influence the direction of the human rights violations revealed by the Report. The Mission added that civilian governmental obfuscations and cover-ups in fact contributed to the commission of the atrocities. It also castigated the UN for failing to deal with atrocities rather than development goals, humanitarian access and quiet diplomacy.[49]

The Mission then emphasized the need for accountability in Myanmar. Though Myanmar conducted investigations into some allegations of breaches of international norms, none met the requirements of what it took to properly investigate serious breaches of human rights according to international standards. The Mission wrote: “The reason is simple: this is not possible in Myanmar.”[50] The Constitution places the military beyond civilian control. The domestic court system is not independent and cannot respect fair trial standards, such as protecting witnesses from intimidation. Myanmar has shown itself unable and unwilling to prosecute crimes under international law.[51] However, Myanmar courts have recently sentenced journalists for reporting on atrocities, such as the slaughter and mass-burial of 10 Rohingya men by Tatmadaw soldiers, aided by some Buddhist villagers.[52] A footnote to the story of the role of social media in this conflict is that the Internet has been used as a vehicle by which Tatmadaw supporters applaud the sentencing of these journalists.[53]

Conclusion

While the world watches, the Rohingya suffer.

The Report’s recommendation that the Security Council refer the case to the ICC will run up against the veto-power of China and Russia.[54] And among the other veto powers, President Trump did not mention the Rohingya in his speech at the UN General Assembly in September 2017.[55] This probably demonstrates that the Rohingya issue is not high in US priorities.

Erna Paris points out that labelling of the actions of the Tatmadaw as genocide engages parties to the Genocide Convention attempt to prevent this crime and to punish perpetrators. She suggests that Canada should try to assemble a coalition of countries wiling to challenge the impunity of those accused of genocidal intent.[56] She emphasizes the risk the Mission has taken in alleging that the actions of the Tatmadaw commanders it has singled out demonstrate genocidal intent[57] because it puts the international rule of law in question. Because the Mission assessed the guilt of numerous parties of international crimes on a balance of probabilities, rather than saying the evidence could meet the criminal standard of proof beyond a reasonable doubt, this may be something of an overstatement. However, the Report does throw down the gauntlet before Member States of the UN by showing in a forceful and persuasive way that the elements of these crimes should be measured in the proper forum and the perpetrators made accountable. The building blocks for ending impunity here have been well assembled by the Mission.

Though the crimes the Mission has drawn attention to are despicable and their results deplorable, it has also drawn attention to a more basic crime. Just as the fundamental crime of aggression is now activated within the jurisdiction of the ICC, another fundamental problem is demonstrated by the Mission's Report: the incendiary effect of hate speech in turning neighbors into murderous enemies.

Please cite this article as: James Hendry, "International Crimes in Myanmar Alleged in Human Rights Council Report" (2018) 2 PKI Global Just J 27.

James Hendry **About the Author**

James Hendry is the Editor-in-Chief of the PKI Global Justice Journal. He served as counsel to the Canadian Human Rights Commission before joining the Department of Justice in 1989. He was General Counsel at the DOJ until retirement in 2011, working in civil Charter social policy review, specializing in equality rights, human rights legislation, and human rights act design. He has also published extensively on Canadian and comparative constitutional issues and has lectured in Canada, Spain, South Africa, the United States and Hong Kong.

References

1. Advance Unedited Version, A/HRC/39/64 at https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFM-Myanmar/A_HRC_39_64.pdf.
2. Id. para. 87.
3. Id. para. 88.
4. Id. para. 10.
5. Id. para. 89.
6. Id. para. 92. One of them, Maj.-Gen. Maung Maung Soe, Commander, Western Regional Military Command, was placed on the Magnitsky Act list in Canada and any assets of his frozen and he was declared inadmissible under the *Immigration and Refugee Protection Act*.
7. Pre-Trial Chamber 1 ordered that the ICC can exercise jurisdiction over the deportation of the Rohingya, September 6, 2018, online https://www.icc-cpi.int/Pages/item.aspx?name=pr1403.
8. Note 1 paras. 100-103.
9. Id. paras. 8-9.
10. Id. paras. 11-12, 14.
11. R. Collins, *Violence: A Micro-Sociological Theory* (2008, PrincetonUP), 19-20.

12. Note 1 fn. 3.
13. Id. para. 16.
14. Id. para. 25.
15. Id. para. 25.
16. Id. para. 26.
17. Id. para. 35, from a Facebook post, September 2, 2017. The Economist also notes the use of Facebook as the synonym for the Internet in Myanmar, as the means used for the spread of anti-Muslim hate speech there.
18. [2005] 2 S.C.R. 100, 2005 SCC 40.
19. Id. eg. paras. 66-69.
20. Id. para. 102.
21. 2013 SCC 11, [2013] 1 S.C.R. 467.
22. Id. paras. 74-76.
23. Id. para. 74.
24. Id. para. 66.
25. "Myanmar's military guilty of "genocidal intent" against Rohingya: UN", Globe and Mail, August 28, 2018.
26. The Economist, "Worse than even imagined: The UN accuses the Burmese army of genocide," September 1-7th, 2018, 36.
27. Note 1 para. 16.
28. Id. paras. 17-19.
29. Id. para. 21.
30. Id. para. 22.
31. Id. para. 24.
32. Id. paras. 25-26.
33. Id. para. 29.
34. Id. para. 32.
35. Id. para. 33.
36. Id. para. 35.
37. Id. para. 50.
38. Id. para. 38.
39. Id. para. 46.
40. Id. para. 44.
41. Id. para. 53.
42. Id. para. 59.

43. Id. para. 60.
44. Id. para. 67.
45. Id. para. 77.
46. Id. para. 79.
47. Note 26, the Economist, 36.
48. Note 1 para. 92.
49. Id. para. 94.
50. Id. para. 96.
51. Id. para. 98.
52. “Myanmar draws global condemnation for prison sentences of journalists”, Globe and Mail, September 4, 2018.
53. Id.
54. Note 26, the Economist, 36.
55. “This is what true leaders look like”, Final Speech of out-going UN High Commissioner for Human Rights Zeid, August 30, 2018, online: https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23489….
56. Erna Paris, “What Myanmar will tell us about the international rule of law”, Globe and Mail, September 1, 2018, 4.
57. Id. and see note 1 para. 87.